Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

HECTOR REVELO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

JOHN M. BAILEY
Chief State's Attorney

LEON F. DALBEC, JR.*
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828

**Counsel of Record*

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QUESTION PRESENTED

As a result of this Court's holding in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978), when a defendant knowingly and voluntarily enters a plea to a criminal charge, agreeing to be sentenced to a definite term of imprisonment, can the defendant later claim on appeal that the agreed upon sentence resulted from judicial vindictiveness, in violation of the defendant's right to due process as protected by the fourteenth amendment to the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINION BELOW

The opinion of the Supreme Court of Connecticut, which is the subject of this petition, is reported as *State v. Hector Revelo*, 256 Conn. 494, 775 A.2d 260 (2001), and is reprinted in the appendix, p. A-1, *infra*. The opinion of the Appellate Court of Connecticut is reported as *State v. Hector Revelo*, 55 Conn. App. 217, 740 A.2d 390 (1999), and is reprinted in the appendix, p. A-25, *infra*.

JURISDICTION

On June 26, 2001, the Supreme Court of Connecticut entered judgment in this case. The jurisdiction of this Court to review the judgment of the Supreme Court of Connecticut is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts and procedural history in this case are undisputed. The defendant was charged, by four count information, with two counts of selling illegal drugs in violation of Connecticut General Statutes § 21a-278(a), one count of operating a drug factory in violation of Connecticut General Statutes § 21a-277(c) and one count of risk of injury to a child in violation of Connecticut General Statutes (Rev. to 1997) § 53-21. *State v. Revelo*, 256 Conn. 494, 497, 775 A.2d 260 (2001). "These charges stemmed from the execution of a search warrant at the defendant's home that resulted in the seizure of a substantial quantity of cocaine." *Id.* On June 17, 1997, the trial court, the Honorable Richard A. Damiani, presiding, announced for the record that the defendant had rejected the following plea offer:

[The Court:]	. . . This is State versus Hector Revelo. . . . Now, in this matter, Mr. Revelo, I offered you eight years to serve in jail. You understand that? Si or no? And you want to have a hearing on a motion to suppress, right?
[Defendant:]	Yes.
[The Court:]	And if you lose that motion and you want to plead, it's nine years, not eight years. You understand that?
[Defendant:]	Yes.

See T. 6/17/97 at 1.

On August 13, 1997, the trial court, the Honorable Charles D. Gill, presiding, heard oral arguments regarding the defendant's motion to suppress evidence obtained during a search of the defendant's residence pursuant to a duly executed

search warrant.[1] *See* T. 8/13/97 at 2-18. Essentially, the defendant argued that the search warrant affidavit failed to establish probable cause. *Id.* at 2-13. By written Memorandum of Decision, dated August 14, 1997, Judge Gill denied the defendant's motion to suppress, ruling that the warrant "affidavit here presented a substantial factual basis, including reasonably drawn inferences, that uphold the validity of the warrant and the magistrate's conclusion that probable cause existed." *See* Memorandum of Decision, dated August 14, 1997.

Two weeks later, on August 28, 1997, the defendant again appeared before Judge Damiani. *State v. Revelo*, 256 Conn. at 498.[2] On this occasion, the defendant accepted an offer of a plea bargain for a definite sentence of nine years imprisonment on the charge of sale of illegal drugs, reserving the right to appeal Judge Gill's denial of his motion to suppress. *Id.* The state also agreed, as part of the plea bargain, to nolle the three remaining charges. *Id.* During the canvass of the defendant's plea, the defendant was asked, in relevant part, the following:

[The Court:]	Anyone force you or threaten you to plead no contest?
[Defendant]	No.
[The Court:]	*Now, the agreement is nine years; do you understand that?*
[Defendant]	*Yes.*
[The Court:]	You filed a written plea of nolo contendere. It's a conditional plea of nolo contendere in that you want the right to take an appeal from

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[1] The motion to suppress the evidence obtained from the search of the defendant's residence was heard and decided by a judge different from the one who had been involved in plea negotiations with the defendant. *See State v. Revelo*, 256 Conn. at 498 n.6.

[2] Again, the Honorable Richard A. Damiani was the judge that originally participated in plea negotiations with the defendant. *See State v. Revelo*, 256 Conn. at 499 n.9.

Judge Gill's denial of your motion to suppress evidence based on a reasonable search or seizure; do you understand that?

[Defendant] Yes.

[The Court:] And the issue to be considered in such an appeal is solely and limited to whether it was proper for the Court to have denied the motion to suppress, do you understand that?

[Defendant] Yes.

* * * * * *

[The Court:] Okay. You pled no contest. You're not admitting that the drugs were yours. You've entered your plea to accept the sentence of nine years rather than go to trial where you acknowledge the State would have had substantial evidence to convict you and if convicted, you could have received a more severe penalty; do you understand that?

[Defendant:] Yes.

(Emphasis added.) T. 8/28/97 at 7-9.

The trial court then accepted the defendant's conditional plea of nolo contendere. T. 8/28/97 at 9. Thereafter, the defendant immediately waived his right to a presentence investigation report and asked the court to impose its sentence. T. 8/28/97 at 9. The court, consistent with the agreement, ordered the defendant "committed to the custody and care of the Commissioner of Corrections for a period of nine years." *Id.* at 10. After the court sentenced the defendant, it entered a nolle on the three remaining charges; *i.e.*, one count of the sale of illegal drugs, one count of operating a drug factory and one count of risk of injury to a minor.

On October 29, 1997, the defendant filed an appeal with the Connecticut Appellate Court. *See State v. Revelo*, 55 Conn. App. 217, 740 A.2d 390 (1999). The first issue raised in this appeal

was whether the trial court erred in denying the defendant's motion to suppress after determining that probable cause existed to issue a search warrant. *Id.* at 219-222. The Appellate Court fully reviewed this issue and, in a decision released on October 12, 1999, unanimously held "that the trial court properly found that probable cause existed to issue the search warrant and, therefore, properly denied the defendant's motion to suppress." *Id.* at 222.

The second issue raised in this appeal was a federal due process claim in which the defendant argued that his sentence of nine years imprisonment resulted from judicial vindictiveness. *See State v. Revelo*, 55 Conn. App. at 222-226. Specifically, "the defendant claimed that the trial court's imposition of the nine year sentence violated his right to due process because the court imposed that sentence, instead of the eight year sentence that he originally had been offered, solely because he had chosen to exercise his constitutional and statutory rights to a judicial determination of his motion to suppress." *State v. Revelo*, 256 Conn. at 499. The Appellate Court, by a two to one majority, held that, because the defendant had accepted the terms of the court's plea offer "knowingly and freely," the offer contained "no element of punishment or retaliation." *State v. Revelo*, 256 Conn. at 500; *State v. Revelo*, 55 Conn. App. at 225.

On November 1, 1999, the defendant filed a petition for certification to the Connecticut Supreme Court. *See State v. Revelo*, 252 Conn. 903, 743 A.2d 617 (1999). On December 7, 1999, the Connecticut Supreme Court granted the defendant's petition, limited to the following issue:

> Did the Appellate Court properly conclude that it lacked subject matter jurisdiction over the defendant's claim of judicial vindictiveness subsequent to his plea of nolo contendere, and, if not, were the defendant's due process rights violated when the trial court sentenced him to a greater period

> of incarceration after the denial of his suppression motion than it would have if he had waived his right to a determination of his suppression claim and entered his nolo plea prior to a determination of that claim?

Id.

On June 26, 2000, the Connecticut Supreme Court released an opinion which reversed, in part, the judgment of the Connecticut Appellate Court. *See State v. Revelo*, 256 Conn. at 496. Specifically, the Court held "that the defendant's [federal] due process claim merits appellate review and, furthermore, that the plea agreement and resulting imposition of the nine year sentence in this case does not satisfy the requirements of due process." *Id.* at 502. In reaching this holding, the Court observed that "the trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress. In doing so, the trial court unfairly punished the defendant for exercising that right in violation of the federal due process clause." *Id.* at 514. Accordingly, the Court reversed the judgment of the Appellate Court "with respect to the defendant's due process challenge to the trial court's imposition of the nine year sentence and" remanded the case "to that court with direction to remand the case to the trial court with direction to allow the defendant either to withdraw his plea of nolo contendere or to be resentenced on that plea and for further proceedings in accordance with law." *Id.* at 517.

REASONS FOR GRANTING THE PETITION

The Connecticut Supreme Court held that, despite the fact that the defendant voluntarily and intelligently entered a plea of nolo contendere and agreed to a definite sentence of nine years imprisonment, the imposition of such sentence resulted from judicial vindictiveness, in violation of the defendant's right to

due process as protected by the fourteenth amendment to the United States Constitution. In rendering this holding, the Connecticut Supreme Court relied solely on, and misinterpreted, prior holdings of this Court. In particular, the Connecticut Supreme Court plainly misinterpreted this Court's holding in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978). Therefore, because the Connecticut Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court," the State of Connecticut's petition for a writ of certiorari in this case should be granted. *See* Rule 10(c) of the Rules of the Supreme Court of the United States.

In considering this petition, it is first important to recognize that unlike many jurisdictions,[3] the Connecticut Supreme Court "expressly has approved judicial involvement in plea discussions when it is clear to all concerned parties that, in the event a plea agreement is not reached, the judge involved in the plea negotiations will play no role in the ensuing trial, including the imposition of sentence upon conviction." *State v. Revelo*, 256 Conn. at 506-507; *see also State v. Niblack*, 220 Conn. 270, 596 A.2d 407 (1991)(where the Court specifically approved of the practice of judges participating in plea negotiations provided, if unsuccessful, any trial would be before a different judge); *Safford v. Warden*, 223 Conn. 180, 194 n.16, 612 A.2d 1161 (1992).[4] This requirement, that in the event that a plea agreement

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[3] By rule, federal district judges are prohibited from active participation in plea discussions. *See* Fed. Rule Crim. Proc. 11(e)(1)

[4] In fact, in *Revelo*, the Connecticut Supreme Court reaffirmed the fact that it "is a common practice in this state for the presiding criminal judge to conduct plea negotiations with the parties. *If plea discussions ultimately do not result in a plea agreement, the trial of the case is assigned to a second judge who was not involved in the plea discussions and who is unaware of the terms of any plea bargain offered to the defendant.* The judge responsible for trying the case also is responsible for sentencing the defendant in the event the defendant is convicted after trial." (Emphasis added.) *State v. Revelo*, 256

is not reached, any trial would be before a different judge and the judge involved in the plea negotiations would play no role in the ensuing trial, including the imposition of sentence upon conviction, fully protects the defendant from any possibility of judicial vindictiveness resulting from the breakdown of plea negotiations.

With that in mind, the record in this case reveals that the defendant was free to choose from a multitude of options. Before the suppression hearing was held, he was free to: (1) enter a guilty plea in exchange for a sentence to a definite term of eight years imprisonment; (2) proceed with a motion to suppress which, if successful, likely would have meant that the charges filed against him would have been dismissed, but, if unsuccessful, and if he thereafter wanted to enter a guilty plea, he would have been required to accept a sentence to a definite term of nine years imprisonment;[5] or (3) reject all plea offers and proceed to trial before a judge who had not been involved in any of the plea negotiations. The defendant chose the second option; *i.e.*, he rejected the offer of eight years and pursued a motion to suppress.

After losing his motion to suppress, the defendant was still free to choose from one of two options: (1) enter a plea of nolo contendere, agreeing to be sentenced to a definite term of

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Conn. at 508 n.25.

[5] Logically, this option simply reflected the fact that if the defendant failed to succeed in his motion to suppress, he would have expended scarce judicial resources while, at the same time, the state's case against him would have been materially strengthened. *See also State v. Revelo*, 256 Conn. at 515 n.28 (where the Court observed, "we see no reason why the [trial] court would have been prohibited from informing the defendant of the possibility of a greater sentence if he pressed and lost his motion to suppress because, in that event, the prosecutor's hand would be strengthened considerably, and, in addition, the defendant arguably would be entitled to less consideration for his plea than if he had chosen to accept responsibility for the offense at an earlier stage of the proceedings.").

imprisonment of nine years while reserving the right to appeal the trial court's ruling denying his motion to suppress;[6] or (2) reject the plea offer and proceed to trial before a judge who had not been involved in any of the plea negotiations. The defendant, as illustrated by the canvass of the plea, knowingly and voluntarily chose the first option.

The Connecticut Supreme Court, in holding that the nine year sentence that the defendant received resulted from judicial vindictiveness, stated that "the trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress. In doing so, the trial court unfairly punished the defendant for exercising that right in violation of the federal due process clause." *State v. Revelo*, 256 Conn. at 514. This is simply wrong, The *only* reason the trial court sentenced the defendant to a definite term of nine years imprisonment was because the defendant knowingly and voluntarily chose to enter a plea affirmatively accepting this sentence. At all times, the defendant retained the option to reject the plea offer and proceed to trial before a judge that had not been involved in the plea negotiations. When a defendant has the option to go to trial before a judge who was not involved in the plea negotiations, but instead knowingly and voluntarily chooses to accept a plea offer to a definite term of imprisonment, it is illogical to conclude that sentence imposed resulted from judicial vindictiveness. Instead, the only logical conclusion is that the sentence resulted from an informed decision on the part of the defendant to accept the plea offer.

In holding that the sentence imposed in this case resulted from judicial vindictiveness, the Connecticut Supreme Court relied upon, and misinterpreted, prior decisions of this Court. Specifically, the Connecticut Supreme Court appears to have relied heavily on *North Carolina v. Pearce*, 395 U.S. 711, 89

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[6] Additionally, with this option, three of the four charges filed against the defendant would be nolled.

S.Ct. 2072 (1969). *See State v. Revelo*, 256 Conn. at 509. In *Pearce*, this Court held "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction" after a criminal defendant successfully attacks an initial conviction on appeal. *North Carolina v. Pearce*, 395 U.S. at 723. However, this Court held that because a defendant's exercise of a right to appeal must be free and unfettered, "it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Id.* at 723-24. This Court then observed: "Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.* at 725. Accordingly, in order to assure the absence of such a motivation, this Court instructed "that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" in the record. *Id.* at 726.

Pearce offers no support for the holding in the present case. The most obvious distinction between *Pearce* and the present case is that in *Pearce*, after the defendant was reconvicted after having succeeded in his appeal, the trial court had *unilateral* authority to determine the appropriate sentence that should be imposed, thus raising legitimate concerns of judicial vindictiveness, while here, the trial court had *no* such unilateral authority to impose a particular sentence. Here, Judge Damiani could not sentence the defendant to a term of nine years imprisonment unless the defendant knowingly and voluntarily

agreed to such a sentence. It was the defendant's option to accept the plea agreement or go to trial before a judge not involved in the plea negotiations. Any concern of judicial vindictiveness vanishes under circumstances where the most the trial court can do is make an offer which then requires a knowing and voluntary acceptance by the defendant. Accordingly, as illustrated, *Pearce* has no application to the facts of this case and any reliance on the *Pearce* holding by the Connecticut Supreme Court was misplaced.[7]

The issue of vindictiveness in the plea bargaining process has been addressed specifically by this Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978). In *Bordenkircher*, the prosecutor, during plea negotiations, offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. *Id.* at 358. At the same time, the prosecutor told Hayes that if he did not plead guilty, the prosecutor would return to the grand jury and seek an indictment under Kentucky's Habitual Criminal Act, which would subject Hayes, if found guilty, to a mandatory sentence of life imprisonment. *Id.* at 358-359. Hayes elected not to plead guilty, and the prosecutor returned to the grand jury and obtained an indictment under the Habitual Criminal Act. *Id.* at 359. After a trial before a jury, the defendant was convicted and was sentenced to the mandatory life term of imprisonment. *Id.* On appeal to this Court, the defendant argued that his right to due process was violated when, after he rejected the plea offer of five years and exercised his constitutional right to a jury trial, the prosecutor vindictively

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[7] In fact, this Court has suggested that the *Pearce* holding has limited application. Specifically, in *Colton v. Kentucky*, 407 U.S. 104, 116, 92 S.Ct. 1953 (1972), this Court held that *Pearce* does not apply in the context of a two-tiered system allowing for a trial de novo in a court of general criminal jurisdiction following a trial in an inferior court. Additionally, in *Chaffin v. Stynchcombe*, 412 U.S. 17, 28, 93 S.Ct. 1977 (1973), this Court held that *Pearce* does not apply to cases in which a defendant, after successfully challenging his conviction on appeal, subsequently is convicted and resentenced by a jury as opposed to the court.

increased the charges filed against him exposing him to the mandatory life term of imprisonment. *Id.* at 361.This Court rejected this argument.

First, this Court distinguished its holding in *Pearce* by observing that, in *Pearce*, "the Court was dealing with the State's *unilateral* imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction -- a situation `very different from the give-and-take negotiations common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" *Bordenkircher v. Hayes*, 434 U.S. at 362. This Court observed that "in the `give-and-take' of plea bargaining, there is *no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.*" (Emphasis added) *Id.* at 363. "Plea bargaining flows from `the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Id.* "Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process." *Id.* "`While confronting a defendant with the risks of more severe punishment clearly may have a `discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'-- and permissible-- `attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Id.* at 364; *quoting Chaffin v. Stynchcombe*, 412 U.S. at 31.

The obvious distinction between *Bordenkircher* and the present case is that in *Bordenkircher* the concern was prosecutorial vindictiveness while in the present case the concern is judicial vindictiveness. However, while the Connecticut Supreme Court relied upon this distinction, it is a distinction without significance. Specifically, in an attempt to distinguish this Court's holding in *Bordenkircher*, the Connecticut Supreme Court observed that, while the prosecutor and the defendant were

on equal footing for purposes of bargaining power in *Bordenkircher*, here, the trial court wielded much more power over the defendant in plea negotiations. *See State v. Revelo*, 256 Conn. at 515.[8] The fact of the matter, however, is that the opposite is true, which demonstrates that the Connecticut Supreme Court has completely misconstrued this Court's holding in *Bordenkircher*. The prosecutor in *Bordenkircher* wielded much more power in plea negotiations than did the trial judge in the present case. In *Bordenkircher*, when the defendant rejected a plea offer of five years imprisonment, the prosecutor increased the charges filed against the defendant exposing him to a mandatory term of life imprisonment. *Bordenkircher v. Hayes*, 434 U.S. at 361. In contrast, the trial judge involved in the plea negotiations in the present case wielded no such power over the defendant. Had the defendant rejected the plea offer, the judge involved in the plea negotiations could not increase the charges filed against the defendant. More importantly, the judge involved in the plea negotiations could not unilaterally sentence the defendant to a term of imprisonment. Any power afforded the judge to sentence the defendant had to come from the defendant himself. The defendant had to knowingly and voluntarily agree to the sentence. If the defendant chose to reject the offer, the judge involved in the plea negotiations had no authority over the defendant other than to send the case to trial before another judge who was not involved in plea negotiations.

The defendant in this case was sentenced to a term of nine years imprisonment. He received this sentence because he knowingly and voluntarily accepted the offered plea bargain. He could have rejected the offer, at which point he would have

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[8] Specifically, the Court in *Revelo* stated: "The [trial] court, in wielding its power as it did in this case, discharged its sentencing function in a manner that is legally indistinguishable from the kind of `unilateral imposition of a penalty upon a defendant who ha[s] chosen to exercise a legal right' that has been held unconstitutional. *Bordenkircher v. Hayes*, *supra*, 362." *State v. Revelo*, 256 Conn. at 494.

received a trial before a judge who had not been involved in the plea negotiations. He chose to accept the plea offer. The trial court had no authority to unilaterally impose such a sentence upon the defendant. The only reason that the defendant was sentenced to nine years imprisonment was because the defendant accepted the plea offer. Thus, the sentence imposed did not result from judicial vindictiveness. The Connecticut Supreme Court's holding in this matter, that the defendant's right to due process, as protected by the federal constitution, was violated because the sentence he received resulted from judicial vindictiveness, is completely inconsistent with this Court's holdings in *Pearce* and *Bordenkircher*. Because the Connecticut Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court": *see* Rule 10(c) of the Rules of the Supreme Court of the United States; the State of Connecticut's petition for a writ of certiorari in this case should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF CONNECTICUT

JOHN M. BAILEY
Chief State's Attorney

Counsel of Record:

LEON F. DALBEC JR.
Senior Assistant State's Attorney
Office of the Chief State's Attorney

September, 2001

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OPINION OF THE SUPREME COURT OF CONNECTICUT A-1

OPINION OF THE APPELLATE COURT OF CONNECTICUT A-25

STATE OF CONNECTICUT *v.* HECTOR REVELO (SC 16226)

McDonald, C. J., and Norcott, Palmer, Sullivan and Vertefeuille, Js.*

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crime of sale of cocaine, the defendant, on the granting of certification, appealed to this court from the judgment of the Appellate Court affirming his conviction. The defendant claimed, inter alia, that the trial court's role in the plea bargaining process in this case violated his constitutional right to due process. Specifically, the defendant contended that the trial court improperly had penalized him for exercising his right to a judicial determination of his motion to suppress by changing the terms of its

* The listing of justices reflects their seniority status on this court as of the date of argument.

Although Chief Justice McDonald reached the mandatory age of retirement before the date that this opinion officially was released, his continued participation on this panel is authorized by General Statutes § 51-198 (c).

plea offer from eight years to nine years imprisonment upon learning of the defendant's decision to exercise that right and imposing a nine year sentence following the defendant's conditional plea of nolo contendere, which the defendant had entered as a result of the denial of his motion to suppress. *Held*:

1. Although the defendant's constitutional claim fell outside the scope of the statute (§ 54-94a) applicable to appeals following conditional pleas of nolo contendere, the defendant met his heavy burden of establishing that appellate review was warranted; the defendant's claim gave rise to an important issue, the significance of which transcended this case, the undisputed facts bore out the defendant's claim of a constitutional violation and dictum in the majority opinion of the Appellate Court indicated that the allegedly unconstitutional imposition of an additional period of incarceration in this case was permissible.
2. The trial court, having imposed an additional period of incarceration solely because the defendant asserted his right to a judicial ruling on his motion to suppress, unfairly punished the defendant for exercising that right in violation of the federal due process clause; accordingly, the case was remanded with direction to allow the defendant to be resentenced on his plea of nolo contendere or to withdraw that plea.

Judicial participation in plea negotiations, discussed.

Argued October 26, 2000—officially released June 26, 2001

Procedural History

Substitute information charging the defendant with two counts of the crime of the sale of cocaine and with one count each of the crimes of operating a drug factory and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the court, *Gill, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Damiani, J.*, on a conditional plea of nolo contendere to one count of the sale of cocaine; subsequently, the remaining charges were nolled and the court, *Damiani, J.*, rendered judgment of guilty in accordance with the defendant's plea of nolo contendere, from which the defendant appealed to the Appellate Court, *Foti* and *Landau, Js.*, with *Shea, J.*, dissenting, which affirmed the judgment of the trial court, and the defendant, on the granting of certifica-

tion, appealed to this court. *Reversed in part; further proceedings.*

Alix C. Walmsley, assistant public defender, with whom, on the brief, was *Pamela Nagy*, assistant public defender, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *John A. Connelly*, state's attorney, and *Cynthia Serafini*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. This appeal raises a question of first impression regarding the constitutional limits on judicial involvement in plea bargaining. The principal issue that we must decide is whether the due process rights of the defendant, Hector Revelo, were violated when the trial court: (1) offered to sentence the defendant to eight years imprisonment for the defendant's plea of guilty of General Statutes § 21a-278[1] in connection with the defendant's sale of narcotics; (2) withdrew that offer upon learning that the defendant wished to exercise his right to a judicial determination of his then pending motion to suppress; (3) informed the defendant that he would receive a sentence of nine years imprisonment if he decided to plead guilty in the event that his motion to suppress was denied; and (4) imposed the nine year

[1] The sale of narcotics is prohibited under General Statutes § 21a-278 (a), which provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person one or more preparations, compounds, mixtures or substances containing an aggregate weight of one ounce or more of heroin, methadone or cocaine or an aggregate weight of one-half gram or more of cocaine in a free-base form or a substance containing five milligrams or more of lysergic acid diethylamide, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, shall be imprisoned for a minimum term of not less than five years nor more than twenty years; and, a maximum term of life imprisonment. . . ."

sentence following the defendant's conditional plea of nolo contendere, which the defendant had entered as a result of the denial of his motion to suppress. We conclude that the additional year of confinement that the trial court imposed on the defendant for exercising his right to a judicial determination of his motion to suppress violates the due process clause of the fourteenth amendment to the United States constitution.[2]

The following undisputed facts and procedural history are set forth in the opinion of the Appellate Court. "The defendant was charged in a four count information with two counts of selling illegal drugs in violation of § 21a-278 (a), one count of operating a drug factory in violation of General Statutes § 21a-277 (c)[3] and one count of risk of injury to a child in violation of General Statutes [Rev. to 1997] § 53-21.[4] [These charges stemmed from the execution of a search warrant at the defendant's home that resulted in the seizure of a substantial quantity of cocaine.] On June 17, 1997, the trial court announced that a plea offer of 'eight years to serve in jail' had been made to the defendant, but that the defendant wanted a hearing on his motion to suppress [in which he alleged that the facts set forth in the warrant did not support a finding of probable

[2] The due process clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[3] General Statutes § 21a-277 (c) provides in relevant part: "No person shall knowingly possess drug paraphernalia in a drug factory situation as defined by subdivision (20) of section 21a-240 for the unlawful mixing, compounding or otherwise preparing any controlled substance for purposes of violation of . . . chapter [420b of the General Statutes]."

[4] General Statutes (Rev. to 1997) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

cause]. The court stated further that if the defendant wanted to plead guilty after losing that motion, the sentence would be nine years instead of eight years.[5] The defendant responded that he understood.

"Two weeks after the denial of his motion to suppress,[6] the defendant accepted an offer of a plea bargain for a definite sentence of nine years imprisonment on the charge of sale of illegal drugs, reserving the right to appeal the denial of his motion to suppress pursuant to [General Statutes] § 54-94a.[7] The state agreed to nolle the three remaining charges. After canvassing the defendant about his understanding of the consequences of a nolo contendere plea [including his right to seek appellate review of the denial of his motion to suppress] and informing him that a sentence of nine years imprisonment would be imposed under the plea agreement, the

[5] The following is the relevant portion of the colloquy between the trial court and the defendant:

"The Court: . . . Now, in this matter . . . I offered you eight years to serve in jail. You understand that? . . . And you want to have a hearing on a motion to suppress, right?

"The Defendant: Yes.

"The Court: And if you lose that motion and you want to plead, it's nine years, not eight years. You understand that?

"The Defendant: Yes."

[6] "The motion to suppress the evidence obtained from the search of the defendant's apartment was heard and decided by a judge different from the one who imposed the sentence." *State* v. *Revelo*, 55 Conn. App. 217, 223 n.4, 740 A.2d 390 (1999).

[7] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

trial court accepted the plea on the charge of selling illegal drugs.[8] At the conclusion of the proceeding, the court imposed a sentence of nine years [imprisonment]."[9] *State* v. *Revelo*, 55 Conn. App. 217, 222–23, 740 A.2d 390 (1999).

On appeal to the Appellate Court, the defendant claimed that the affidavit in support of the search warrant for his apartment did not contain facts sufficient to permit a finding of probable cause to justify the search. Id., 219. The defendant also claimed that the trial court's imposition of the nine year sentence violated his right to due process because the court imposed that sentence, instead of the eight year sentence that he originally had been offered, solely because he had chosen to exercise his constitutional and statutory rights to a judicial determination of his motion to suppress. Id., 223.

[8] The following colloquy occurred between the trial court and the defendant during the plea canvass:

"The Court: Now, the agreement is nine years. Do you understand that?

"The [Defendant]: Yes.

* * *

"The Court: You filed a written plea of nolo contendere. It's a conditional plea of nolo contendere in that you want the right to take an appeal from [the] denial of your motion to suppress . . . . Do you understand that?

"The [Defendant]: Yes.

"The Court: And the issue to be considered in such an appeal is solely, and limited to, whether it was proper for the court to have denied the motion to suppress. Do you understand that?

"The [Defendant]: Yes.

* * *

"The Court: Okay. You [pleaded] no contest. You're not admitting that the drugs were yours. You've entered your plea to accept the sentence of nine years rather than go to trial where you acknowledge the state would have had substantial evidence to convict you and, if convicted, you could have received a more severe penalty. Do you understand that?

"The [Defendant]: Yes."

[9] We note that the same judge who had informed the defendant of his sentencing options; see footnote 5 of this opinion; also accepted the defendant's plea and imposed the nine year sentence. That judge was the presiding judge of the criminal division of the judicial district of Waterbury at the time of the defendant's plea and sentencing.

The Appellate Court rejected the defendant's contention regarding the affidavit in support of the search warrant.[10] Id., 222. The Appellate Court also concluded that the defendant was not entitled to review of his due process claim because § 54-94a expressly provides that the issue to be considered in an appeal brought under that section shall be limited to the propriety of the court's denial of the defendant's motion to suppress or motion to dismiss.[11] Id., 224–25, 226; see General Statutes § 54-94a. In declining to review the defendant's due process claim, the Appellate Court reasoned that because the defendant had accepted the terms of the court's plea offer "knowingly and freely"; *State* v. *Revelo*, supra, 55 Conn. App. 225; that offer contained "no element of punishment or retaliation." Id.

Judge Shea dissented from the majority opinion of the Appellate Court panel with respect to the disposition of the defendant's due process claim.[12] Id., 226 (*Shea, J.*, dissenting). Judge Shea concluded that the Appellate Court had jurisdiction to review the defendant's due process claim and that appellate review of that claim was warranted.[13] See id., 229, 232 (*Shea, J.*, dissenting).

[10] Specifically, the Appellate Court concluded that the facts set forth in the affidavit in support of the search warrant were sufficient to establish probable cause to search the defendant's apartment. *State* v. *Revelo*, supra, 55 Conn. App. 222.

[11] The defendant sought the Appellate Court's review of this claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *State* v. *Revelo*, supra, 55 Conn. App. 224; which governs appellate review of unpreserved constitutional claims.

[12] Judge Shea agreed with that portion of the majority opinion upholding the denial of the defendant's motion to suppress. *State* v. *Revelo*, supra, 55 Conn. App. 226 (*Shea, J.*, dissenting).

[13] Judge Shea explained that both the Appellate Court, in *State* v. *Piorkowski*, 37 Conn. App. 252, 258, 656 A.2d 1046 (1995), rev'd on other grounds, 236 Conn. 388, 672 A.2d 921 (1996), and this court, also in *State* v. *Piorkowski*, 236 Conn. 388, 400, 672 A.2d 921 (1996), have "explicitly rejected the view . . . that § 54-94a restricts the subject matter jurisdiction of an appellate court to consider issues involved in an appeal beyond those specified in the statute." *State* v. *Revelo*, supra, 55 Conn. App. 229 (*Shea, J.*, dissenting). In Judge Shea's view, consideration of the defendant's due process claim

Judge Shea also concluded "that the additional year of confinement imposed on the defendant as a penalty for exercising his lawful right to pursue his motion to suppress is contrary to due process of law and, therefore, invalid." Id., 226 (*Shea, J.*, dissenting).

We granted the defendant's petition for certification to appeal limited to the issue of whether the Appellate Court improperly declined to review the defendant's due process challenge to the trial court's imposition of the nine year sentence and, if so, whether, in the particular circumstances of this case, that sentence constituted an impermissible penalty on the defendant's exercise of his right to a judicial determination of his motion to suppress.[14] See *State* v. *Revelo*, 252 Conn.

was warranted under the criteria established by this court for appellate review of unpreserved constitutional claims; see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); and under the supervisory authority that our appellate courts possess over proceedings on appeal to facilitate business and advance justice. *State* v. *Revelo*, supra, 229, 232 (*Shea, J.*, dissenting).

[14] We granted certification limited to the following issue: "Did the Appellate Court properly conclude that it lacked subject matter jurisdiction over the defendant's claim of judicial vindictiveness subsequent to his plea of nolo contendere, and, if not, were the defendant's due process rights violated when the trial court sentenced him to a greater period of incarceration after the denial of his suppression motion than it would have if he had waived his right to a determination of his suppression claim and entered his nolo plea prior to a determination of that claim?" *State* v. *Revelo*, 252 Conn. 903, 903–904, 743 A.2d 617 (1999).

We note that, with respect to the first part of the certified question, both the state and the defendant agree that § 54-94a does not limit an appellate court's subject matter jurisdiction to the issues identified in that provision, namely, challenges to a trial court's ruling on a motion to suppress or a motion to dismiss. See *State* v. *Piorkowski*, 236 Conn. 388, 400, 672 A.2d 921 (1996) ("§ 54-94a is not a subject matter jurisdictional statute"). The parties disagree, however, regarding the accuracy of this court's statement, contained in the certified question, that the Appellate Court "conclude[d] that it lacked subject matter jurisdiction over the defendant's [constitutional] claim . . . ." *State* v. *Revelo*, supra, 252 Conn. 903. The state contends that the Appellate Court declined to review the defendant's due process challenge to his nine year sentence on discretionary grounds, while the defendant construes the opinion of the Appellate Court as concluding that that court lacked subject matter jurisdiction over the defendant's due process claim.

903, 903–904, 743 A.2d 617 (1999). We are persuaded that the defendant's due process claim merits appellate review and, furthermore, that the plea agreement and resulting imposition of the nine year sentence in this case does not satisfy the requirements of due process.[15]

I

The defendant first contends that appellate review of his due process claim is warranted even though that claim gives rise to an issue that does not fall within the ambit of § 54-94a. We agree.

The state concedes that this court has subject matter jurisdiction to entertain the defendant's due process claim even though that claim falls outside the purview of § 54-94a. See footnote 14 of this opinion. In light of that concession, the state also acknowledges that we have discretion to consider the defendant's due process claim under our inherent supervisory authority over the administration of justice.[16] The state contends, how-

Upon further consideration, we are persuaded, contrary to the statement contained in the certified question, that the Appellate Court's refusal to consider the defendant's due process claim was based on its determination that the claim did not *merit* review and not that the court lacked subject matter jurisdiction over the claim.

[15] The defendant also invokes his due process rights under article first, § 8, of the Connecticut constitution. "The defendant does not claim, however, that he is entitled to any greater protection under the due process clause of the state constitution than he is under the analogous provision of the federal constitution. For purposes of this appeal, therefore, we treat the state and federal due process clauses as embodying the same level of protection." *State* v. *Austin*, 244 Conn. 226, 237 n.11, 710 A.2d 732 (1998).

[16] "As an appellate court, we possess an inherent supervisory authority over the administration of justice. . . . The standards that we set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law. . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . We previously have exercised our supervisory powers to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; internal quotation marks omitted.) *State* v. *Coleman*, 242 Conn. 523, 539–40, 700 A.2d 14 (1997). However,

ever, that we should decline to exercise discretionary review of the defendant's due process claim because the defendant effectively had waived that claim when he acknowledged, at his plea canvass, that the sole issue he could raise on appeal was the propriety of the denial of his motion to suppress.[17] In further support of its claim, the state emphasizes that this court has been reluctant to invoke its authority to review an issue raised in connection with a conditional plea of nolo contendere when, as in this case, that issue does not fall within the narrow scope of § 54-94a.[18]

We agree with the thrust of the state's argument that, in the absence of a showing of good cause, an appellate court should decline to review an issue that has not been raised in accordance with the provisions of § 54-94a. We also recognize that such good cause is likely to be established only infrequently. For several reasons, however, we are persuaded that this case presents one of the rare exceptions to the general rule of unreviewability. First, the defendant's due process claim gives rise to an important issue, namely, the proper role of our trial judges in the plea bargaining process, the significance of which transcends this particular case.[19] Sec-

"[o]ur supervisory authority is not a form of free-floating justice, untethered to legal principle. . . . Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers." (Internal quotation marks omitted.) *State* v. *Delvalle*, 250 Conn. 466, 476 n.13, 736 A.2d 125 (1999); see also Practice Book § 60-2 ("[t]he supervision and control of the proceedings on appeal shall be in the court having appellate jurisdiction from the time the appeal is filed, or earlier, if appropriate").

[17] See footnote 8 of this opinion.

[18] See, e.g., *State* v. *Kelley*, 206 Conn. 323, 335–36, 537 A.2d 483 (1988) (refusing to invoke supervisory authority over claim not within purview of § 54-94a); *State* v. *Madera*, 198 Conn. 92, 99–102, 503 A.2d 136 (1985) (same). Contra *State* v. *Chung*, 202 Conn. 39, 44–45, 519 A.2d 1175 (1987) (agreeing to invoke supervisory authority to review claim not within purview of § 54-94a).

[19] We note that we previously have exercised our supervisory authority in regard to the sentencing function of the trial court. See *State* v. *Coleman*, 242 Conn. 523, 534, 700 A.2d 14 (1997).

ond, the undisputed facts of this case bear out the defendant's claim of a constitutional violation. Finally, in explaining its decision not to review the issue, the Appellate Court indicated in dictum that the practice challenged by the defendant is permissible.[20] *State* v. *Revelo*, supra, 55 Conn. App. 225–26. In light of our contrary determination, we are unwilling to allow that dictum to stand lest it be construed by our trial judges as approval of a practice that violates principles of due process. Thus, although the defendant's constitutional claim falls outside the scope of § 54-94a, the defendant has met his heavy burden of establishing that appellate review of his claim nevertheless is warranted.[21]

[20] The Appellate Court stated: "Under the particular circumstances of this case, the defendant knew exactly what was being offered after his motion to suppress was denied, i.e., a sentence of nine years on one count of a four count information, reserving the right to appeal pursuant to § 54-94a. He was free to refuse the offer and to exercise his constitutional right to a trial. Instead, he chose to accept it, knowingly and freely, with the advice and assistance of an attorney, and with a full understanding of the consequences of entering such a plea, as explained to him by the trial court.

"As long as the defendant is free to accept or reject the offer, there is no element of punishment or retaliation. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). By entering his plea of nolo contendere pursuant to § 54-94a, he accepted the condition of the statute that '[t]he issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress . . . .' A review of the plea canvass reveals that the defendant expressly stated that he understood that the only issue he could raise on appeal was whether the trial court improperly denied his motion to suppress.

"Further, the defendant's written and signed plea of nolo contendere offered pursuant to § 54-94a specifically stated that the plea was being entered on the condition that he had the right to take an appeal, with the following motion reserved for review: 'Denial of motion to suppress by Judge Gill.' We conclude, therefore, that the defendant does not have the right to raise on appeal the issue he asks us to review. Accordingly, we will not review his claim." *State* v. *Revelo*, supra, 55 Conn. App. 225–26.

[21] Although it generally is true that a guilty or nolo contendere plea constitutes a waiver of claims that an accused might have raised if he had proceeded to trial, the defendant's due process claim challenges the validity of the process by which the plea agreement was reached. Moreover, although the defendant agreed that the issue on appeal would be limited to that concerning the denial of his motion to suppress, he never expressly waived

II

We next address the defendant's contention that, in the particular circumstances of this case, the trial court's role in the plea bargaining process violated his constitutional right to due process. We agree with the defendant's claim.

We begin our analysis of the defendant's claim by reaffirming our recognition of the critical role that pretrial negotiations play in the criminal justice system. See, e.g., *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 842, 633 A.2d 296 (1993). "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of [the] criminal justice system." *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). Indeed, the United States Supreme Court has stated that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shorten-

his right to challenge the constitutionality of the plea agreement itself. In the particular circumstances presented, we do not believe that the defendant should be foreclosed from appellate review of his constitutional claim.

ing the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Santobello* v. *New York*, 404 U.S. 257, 260–61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). As the United States Supreme Court also has stated, however, the benefits of plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor." Id., 261.

Although plea bargaining between the state and the accused is a universally accepted practice, many jurisdictions bar judges from active participation in plea negotiations.[22] Indeed, on those occasions when this court has addressed claims regarding the active participation in plea bargaining by the judge responsible for trying the case and for sentencing the defendant in the event of a conviction, we have underscored the inappropriateness of such conduct due to its inherent dangers.[23] E.g., *Safford* v. *Warden*, 223 Conn. 180, 194 n.16, 612 A.2d 1161 (1992); *State* v. *Gradzik*, 193 Conn. 35, 47, 475 A.2d 269 (1984); cf. *State* v. *Fullwood*, 194 Conn. 573, 580–81, 484 A.2d 435 (1984).

By contrast, this court expressly has approved judicial involvement in plea discussions when it is clear to all concerned parties that, in the event a plea agreement is not reached, the judge involved in the plea negotia-

[22] For example, federal district court judges are prohibited from active participation in plea discussions. Fed. R. Crim. P. 11 (e) (1). Some states also prohibit judicial involvement in plea discussions between the state and the accused. E.g., Colo. Rev. Stat. § 16-7-302 (1) (2000) ("[t]he trial judge shall not participate in plea discussions"); Wash. Rev. Code Ann. § 9.94A.080 (West 1998) ("[t]he court shall not participate in any [plea] discussions").

[23] "Those dangers are that (1) the trial judge's impartiality may truly be compromised by his [or her] own perception of a personal stake in the agreement, resulting in resentment of the defendant who rejects [the judge's] suggested disposition, (2) the defendant may make incriminating concessions during the course of plea negotiations, and (3) the trial judge may become or appear to become an advocate for his [or her] suggested resolution." (Internal quotation marks omitted.) *Safford* v. *Warden*, 223 Conn. 180, 194 n.16, 612 A.2d 1161 (1992).

tions will play no role in the ensuing trial, including the imposition of sentence upon conviction. We first voiced our approval of this procedure in *State* v. *Niblack*, 220 Conn. 270, 596 A.2d 407 (1991), in which we stated: "The plea negotiations involved an assistant state's attorney, defense counsel and eventually a judge who assisted the adversaries in reaching an agreement, which resulted in the court's recommendation of an aggregate sentence of fifty years on all charges. The judge was responsible for conducting plea negotiations and, if an agreement was reached, for holding a plea and sentencing hearing. If negotiations were not successful, however, a judge who was not involved in the plea negotiations would have presided at trial and pronounced sentence if the defendant were found guilty. We approve of the procedure followed in reaching the plea agreement."[24] Id., 280. This court subsequently has reaffirmed the propriety of this procedure, noting that "[a]s long as the defendant is free to reject the plea offer [made after negotiations conducted by one judge] and go to trial before a [second] judge who was not involved in or aware of those negotiations, [the defendant] is not subject to any undue

[24] In *State* v. *Niblack*, supra, 220 Conn. 270, the defendant claimed that his guilty plea was involuntary because, inter alia, the trial court actively participated in the plea bargaining process. In support of his claim, the defendant pointed to the following colloquy between the court and the assistant state's attorney that occurred after the plea canvass:

The Court: "Is your recommendation fifty years or is my sentence I indicated fifty years?" (Internal quotation marks omitted.) Id., 279.

Assistant state's attorney: "That's yours." (Internal quotation marks omitted.) Id.

The Court: "I've indicated to both the state and to your lawyer that I would impose a sentence of fifty years." (Internal quotation marks omitted.) Id.

As further evidence of the court's active involvement in the plea bargaining process, the defendant in *Niblack* also noted that the court, in denying the defendant's request for a continuance so that he could think further about the court's offer, stated: "We've discussed it at great length at pretrial and I'm not going to hold it open . . . . If he doesn't want the offer, I don't want him to feel he's being pressured. He can have his trial and if he's acquitted I wish him a lot of luck, but I'm not going to have any games played with me." (Internal quotation marks omitted.) Id.

pressure to agree to the plea agreement, and the impartiality of the judge who will sentence him in the event of conviction after trial is not compromised."[25] *Safford* v. *Warden*, supra, 223 Conn. 194 n.16.

The defendant does not challenge our statements in *Niblack* and *Safford* regarding the propriety of a trial court's participation in the plea bargaining process, subject, of course, to the limitations that we have placed on such involvement to ensure fairness in that process. Rather, the defendant contends that the trial court improperly penalized him for exercising his right to a judicial determination of his motion to suppress by increasing the terms of the plea bargain from eight to nine years solely because of his decision to exercise that right. Our resolution of this claim requires, first, a review of the seminal United States Supreme Court cases regarding the propriety of burdening a defendant's exercise of a statutory or constitutional right.

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 [98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)]. In a series of cases beginning with *North Carolina* v. *Pearce*, [395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)] and culminating in *Bordenkircher* . . . the [United States Supreme] Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he [or

[25] It is a common practice in this state for the presiding criminal judge to conduct plea negotiations with the parties. If plea discussions ultimately do not result in a plea agreement, the trial of the case is assigned to a second judge who was not involved in the plea discussions and who is unaware of the terms of any plea bargain offered to the defendant. The judge responsible for trying the case also is responsible for sentencing the defendant in the event the defendant is convicted after trial. As we have indicated; see footnote 9 of this opinion; the judge who conducted the plea negotiations in this case, and who thereafter sentenced the defendant, was the presiding judge.

she] just as certainly may not be punished for exercising a protected statutory or constitutional right. . . .

"In *North Carolina* v. *Pearce*, [supra, 395 U.S. 711], the Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prohibits a trial judge from imposing a harsher sentence on retrial after a criminal defendant successfully attacks an initial conviction on appeal. The Court stated, however, that '[i]t can hardly be doubted that it would be a flagrant violation [of the due process clause] of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside.' [Id., 723–24]. The Court continued: 'Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his [or her] first conviction must play no part in the sentence he [or she] receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.' [Id., 725]. In order to assure the absence of such a motivation, the Court concluded: '[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his [or her] doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.' [Id., 726]. In sum, the Court applied a pre-

sumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.

"In *Blackledge* v. *Perry*, 417 U.S. 21 [94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)], the [United States Supreme] Court confronted the problem of increased punishment upon retrial after appeal in a setting different from that considered in *Pearce*. Perry was convicted of assault in an inferior court having exclusive jurisdiction for the trial of misdemeanors. The court imposed a [six] month sentence. Under North Carolina law, Perry had an absolute right to a trial de novo in the [North Carolina] Superior Court, which possessed felony jurisdiction. After Perry filed his notice of appeal, the prosecutor obtained a felony indictment charging him with assault with a deadly weapon. Perry pleaded guilty to the felony and was sentenced to a term of five to seven years in prison.

"In reviewing Perry's felony conviction and increased sentence, [the] Court first stated the essence of the holdings in *Pearce* and the cases that had followed it: 'The lesson that emerges from *Pearce*, *Colten* [v. *Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)],[26] and *Chaffin* [v. *Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)][27] is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." ' [*Blackledge* v. *Perry*, supra, 417 U.S. 27].

[26] In *Colten* v. *Kentucky*, supra, 407 U.S. 116, the court held that the prophylactic rule announced in *Pearce* does not apply in the context of a two-tier system allowing for a trial de novo in a court of general criminal jurisdiction following a trial or guilty plea in an inferior court because the likelihood of vindictiveness is not present in such circumstances.

[27] In *Chaffin* v. *Stynchcombe*, supra, 412 U.S. 28, the court concluded that the *Pearce* presumption of vindictiveness does not apply to cases in which a defendant, after successfully challenging his or her conviction on appeal, subsequently is convicted and resentenced by a jury.

The Court held that the opportunities for vindictiveness in the situation before it were such 'as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case.' [Id.] . . .

* * *

"In *Bordenkircher* v. *Hayes*, [supra, 434 U.S. 357], the [United States Supreme] Court for the first time considered an allegation of vindictiveness that arose in a pretrial setting. In that case the Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and 'save the court the inconvenience and necessity of a trial' he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment. The defendant refused to plead guilty and the prosecutor obtained the indictment. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge.

"In finding no due process violation, the Court in *Bordenkircher* considered the decisions in *Pearce* and *Blackledge*, and stated: 'In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bar-

gaining power." . . .' The Court stated that the due process violation in *Pearce* and *Blackledge* 'lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.' [Id., 363].

"The Court held, however, that there was no such element of punishment in the 'give-and-take' of plea negotiation, so long as the accused 'is free to accept or reject the prosecution's offer.' [Id.] The Court noted that, by tolerating and encouraging the negotiation of pleas, [the] Court had accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial. The Court concluded: 'We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.' [Id., 365].

"The outcome in *Bordenkircher* was mandated by [the] Court's acceptance of plea negotiation as a legitimate process. In declining to apply a presumption of vindictiveness, the Court recognized that 'additional' charges obtained by a prosecutor could not necessarily be characterized as an impermissible 'penalty.' Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a 'benefit' to the defendant—changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.' An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecu-

tion. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." (Citation omitted.) *United States* v. *Goodwin*, 457 U.S. 368, 372–80, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

As the foregoing cases indicate, principles of due process prohibit a court from retaliating against a defendant merely for exercising a statutory or constitutional right. In this case, the trial court told the defendant that he would be required to serve one extra year in prison if he agreed to plead guilty only after exercising his right to a judicial determination of his motion to suppress. By requiring that additional period of incarceration for no reason other than the defendant's decision to pursue his motion to suppress, the trial court punished the defendant for doing "what the law plainly allow[ed] him to do . . . ." *Bordenkircher* v. *Hayes*, supra, 434 U.S. 363. Although a court may deny leniency to an accused who, like the defendant, elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election.

It has been noted that, in certain circumstances, it may be difficult to draw a meaningful distinction between "enhancing" the punishment imposed on an accused who exercises a constitutional right and denying him the "leniency" that he claims he would deserve if he waived that right. See, e.g., *Roberts* v. *United States*, 445 U.S. 552, 557 n.4, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980) ("[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner [for not cooperating with the government] and denying him the 'leniency' he claims would be appropriate if he had [waived his right to remain silent and] cooperated"). Although the dis-

tinction between refusing to show leniency to an accused who insists on asserting a constitutional right and punishing an accused for asserting that right may, at times, be a fine one, there is no difficulty in discerning what occurred in this case: the trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress. In doing so, the trial court unfairly punished the defendant for exercising that right in violation of the federal due process clause. See, e.g., *United States* v. *Rivera*, 201 F.3d 99, 102 (2d Cir. 1999) (trial court may not impose additional sentence on defendant for exercising fifth amendment right to remain silent after conviction); *United States* v. *Moskovits*, 86 F.3d 1303, 1310–11 (3d Cir. 1996) (trial court may not consider as sentencing factor defendant's decision to exercise constitutional right to trial by jury rather than accept government's plea offer); *United States* v. *Stratton*, 820 F.2d 562, 564 (2d Cir. 1987) (impermissible for trial court to impose enhanced sentence for defendant's refusal to cooperate with investigators by remaining silent).

Relying on the fact that the defendant entered his plea of nolo contendere and was sentenced to nine years in prison as a direct result of plea discussions conducted by the trial court, the state maintains that our analysis of the defendant's due process claim is governed by *Bordenkircher* v. *Hayes*, supra, 434 U.S. 357, which sanctions the government's practice of threatening increased charges during the course of plea negotiations and making good on the threat if the defendant refuses to enter a plea. It is true, of course, that, under *Bordenkircher*, a *prosecutor* engaged in plea negotiations with the defendant lawfully may file additional charges and seek a greater sentence if the defendant does not accept the state's offer. For good reason, however, neither *Bordenkircher* nor any other case that

has been brought to our attention authorizes such conduct by the *court*. As the United States Supreme Court explained in *Bordenkircher*, plea bargaining flows from " 'the mutuality of advantage' "; id., 363; to prosecution and defense, whose " 'relatively equal bargaining power' "; id., 362; is reflected in the " 'give-and-take negotiation' "; id.; that is common in plea negotiations. Such is not the case when, as in this case, the court, itself, dictates the terms of a plea agreement that exacts a penalty on the defendant solely for asserting his right to challenge the constitutionality of the search and seizure that resulted in his arrest and prosecution. In such circumstances, "[t]he unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness." (Internal quotation marks omitted.) *United States* v. *Werker*, 535 F.2d 198, 202 (2d Cir. 1976).[28] The court, in wielding its power as it did in this case, discharged its sentencing function in a manner that is legally indistinguishable from the kind of "unilateral imposition of a penalty upon a defendant who ha[s] chosen to exercise a legal right" that has been held unconstitutional. *Bordenkircher* v. *Hayes*, supra, 362.

As we previously have discussed, this court, in *Safford* v. *Warden*, supra, 223 Conn. 194 n.16, and *State* v. *Niblack*, supra, 220 Conn. 280, expressly authorized

[28] In concluding that the plea agreement in this case violated the defendant's due process rights, we emphasize that, under *Bordenkircher* v. *Hayes*, supra, 434 U.S. 357, the *prosecutor* would not have been barred from threatening to *recommend* a greater sentence in the event the defendant refused to plead guilty prior to obtaining a ruling on his motion to suppress. Moreover, if the prosecutor had taken that position, we see no reason why the court would have been prohibited from informing the defendant of the possibility of a greater sentence if he pressed and lost his motion to suppress because, in that event, the prosecutor's hand would be strengthened considerably, and, in addition, the defendant arguably would be entitled to less consideration for his plea than if he had chosen to accept responsibility for the offense at an earlier stage of the proceedings.

judicial participation in plea negotiations. We have not been asked to reconsider our approval of that practice, and we see no cause to do so. Indeed, neither party has brought to our attention any reason to question the propriety of the trial court's offer of an eight year sentence conditioned upon the defendant's plea of guilty and withdrawal of his motion to suppress. Moreover, it would not have been improper for the court, upon learning of the defendant's decision to reject that offer, to inform the defendant of the potential for a greater sentence in the event his motion was denied. In such circumstances, however, it also would be incumbent upon the court to explain why a greater sentence might be appropriate; see footnote 28 of this opinion; to dispel any suggestion that the court was prepared to punish the defendant merely for exercising his right to a judicial determination of his motion. Indeed, the failure of the trial court in this case to provide such an explanation is a critical factor in our conclusion that the court overstepped its constitutional bounds by adding a year to the defendant's sentence.

In light of our determination that the sentence imposed by the trial court runs afoul of the due process clause, we must determine the appropriate remedy. The state maintains that the defendant is entitled either to a new sentencing hearing or, alternatively, to withdraw his nolo contendere plea. The defendant acknowledges that he is not legally entitled to specific performance of the eight year sentence offered by the trial court prior to the denial of his motion to suppress, but claims that we nevertheless should order that remedy in the interest of fairness. We agree with the state.

"When a guilty plea is induced by promises arising out of a plea bargaining agreement, fairness requires that such promises be fulfilled by the state. . . . The same concept of fairness ordinarily impels the court, in its discretion, either to accord specific performance

of the [plea] agreement or to permit the opportunity to withdraw the guilty plea." (Citation omitted.) *State* v. *Littlejohn*, 199 Conn. 631, 644, 508 A.2d 1376 (1986); accord *State* v. *Garvin*, 242 Conn. 296, 313, 699 A.2d 921 (1997); *State* v. *Niblack*, supra, 220 Conn. 283. Moreover, "[t]he validity of plea bargains depends on contract principles." *State* v. *Garvin*, supra, 314. The defendant was not induced to plead guilty by the court's offer of an eight year sentence; indeed, the defendant exercised his right to refuse that offer. In such circumstances, specific performance is not an appropriate remedy because there is no agreement to be enforced.[29] We conclude that the defendant's rights are fully vindicated by the opportunity either to withdraw his nolo contendere plea or to be resentenced on that plea.

The judgment of the Appellate Court is reversed with respect to the defendant's due process challenge to the trial court's imposition of the nine year sentence and the case is remanded to that court with direction to remand the case to the trial court with direction to allow the defendant either to withdraw his plea of nolo contendere or to be resentenced on that plea and for further proceedings in accordance with law.

In this opinion the other justices concurred.

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[29] By refusing to grant the defendant specific performance of the eight year sentence, we do not suggest that, upon any resentencing, an eight year term of imprisonment would be inappropriate. We intimate no view regarding the appropriate sentence.

STATE OF CONNECTICUT *v.* HECTOR REVELO (AC 17757)

Foti, Landau and Shea, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere pursuant to statute (§ 54-94a), of the sale of cocaine, the defendant appealed to this court challenging the trial court's denial of his motion to suppress evidence seized from his apartment pursuant to a warrant and claiming that that court violated his constitutional rights by adding one year to his sentence because he insisted on contesting the legality of the search. *Held:*

1. The defendant could not prevail on his claim that the facts set out in the warrant application did not establish a sufficient connection between the drugs purchased by an informant from a third party and the defendant's apartment; the trial court properly determined that the facts contained in the warrant application supported a reasonable inference that drugs would be found in the defendant's apartment.
2. The defendant's challenge to the length of his sentence was not reviewable because § 54-94a limits the issue on appeal from a judgment rendered on a conditional plea of nolo contendere to the propriety of the denial of

a motion to suppress or a motion to dismiss; furthermore, the defendant knowingly and freely, with the advise and assistance of counsel, chose to plead guilty and to accept the nine year sentence.

(*One judge dissenting*)

Argued February 24—officially released October 12, 1999

Procedural History

Substitute information charging the defendant with two counts of the crime of sale of cocaine and with the crimes of operating a drug factory and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the court, *Gill, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Damiani, J.*, on a conditional plea of nolo contendere to one count of sale of cocaine; subsequently, the remaining charges were nolled and the court rendered judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Alix C. Walmsley, deputy assistant public defender, with whom was *Pamela Nagy*, assistant public defender, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *John A. Connelly*, state's attorney, and *Cynthia Serafini*, assistant state's attorney, for the appellee (state).

Opinion

FOTI, J. The defendant, Hector Revelo, appeals from the trial court's judgment of conviction of sale of illegal drugs in violation of General Statutes § 21a-278 (a)[1]

[1] General Statutes § 21a-278 (a) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person one or more preparations, compounds, mixtures or substances containing an aggregate weight of one ounce or more of heroin, methadone or cocaine or an aggregate weight of one-half gram or more of cocaine in a free-base form or a substance containing five milligrams or more of lysergic acid diethylamide, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, shall be imprisoned for a minimum term of not less

rendered after a conditional plea of nolo contendere pursuant to General Statutes § 54-94a.[2] On appeal, the defendant challenges the trial court's conclusion that there was probable cause for a search of his apartment and claims that the court violated his constitutional rights by adding one additional year to his sentence because he insisted on a determination of his motion to suppress. We affirm the judgment of the trial court.

I

The defendant challenges the sufficiency of the facts stated in the warrant affidavit to support the finding of probable cause to search his apartment. The affidavit for the search warrant, pursuant to which the defendant's apartment was searched and found to contain illegal drugs, was signed by two Waterbury police officers claiming to have a combined total of forty years training and experience and to have conducted numerous narcotics investigations resulting in arrests and convictions. It stated that within the two weeks prior to the search warrant application, members of the vice and intelligence division of the Waterbury police department had received information that the defendant was using Apartment K at 103 Hamden Avenue as a drug factory and that a Hispanic male known as "Tito" was delivering drugs for the defendant.

than five years nor more than twenty years; and, a maximum term of life imprisonment. . . ."

[2] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

The affidavit then set forth the following narrative: "That within the past few days, a known and reliable confidential informant, who has given the Waterbury police department information that has led to arrests and convictions, came forward and agreed to make a controlled purchase of cocaine from the Hispanic male known as 'Tito.' The informant was searched for drugs and none were found. The informant was given Waterbury police funds for the sole purpose of purchasing cocaine from . . . Tito. The informant then contacted . . . Tito by telephone and arranged a purchase of cocaine at a prearranged location. A surveillance was set up on [the defendant's apartment]. . . . [The defendant] was observed operating a 1988 Dodge Caravan . . . and drove to [his apartment] and entered [it] using a key. . . . A short time later . . . Tito was observed operating a 1983 Toyota Starlet . . . and he was also observed entering [the apartment] using a key. A short time later both parties exited [the apartment] and left in their vehicles. . . .

"Tito was followed to the prearranged location where he met the informant. While under surveillance the informant was observed meeting with . . . Tito. After the meeting the informant then went directly to this affiant and turned over a white powder substance. The informant said that the white powder substance was purchased from . . . Tito. . . . The surveillance was continued and . . . Tito was observed going directly [back to the defendant's apartment] where he met with [the defendant] outside and . . . Tito gave [the defendant] money. . . . "

Although the defendant challenges the sufficiency of the facts stated in the warrant affidavit to support the finding of probable cause to search his apartment, he does not dispute their veracity. The judge who denied the defendant's motion to suppress concluded that the

affidavit "presented a substantial factual basis, including reasonably drawn inferences, that uphold the validity of the warrant and the magistrate's conclusion that probable cause existed."

The defendant relies primarily on *State* v. *DeChamplain*, 179 Conn. 522, 427 A.2d 1338 (1980), in claiming that the facts set out in the warrant application do not establish a sufficient connection between his apartment and the illegal drugs that were delivered to the affiant officer by the informant. In *DeChamplain*, a case involving a similar controlled buy, there was no indication that the drugs delivered to the informant by the seller came from the apartment in question other than the fact that the seller's car was observed parked near the apartment prior to the sale. According to our Supreme Court, "[i]t was just as likely that the marihuana sought to be seized was in another location—for example, in another apartment in the complex or in the [seller's car]—as it was that it was in [the apartment searched]." Id., 532.

The case before us is readily distinguishable. The fact that Tito, after agreeing to meet the informant to sell him illegal drugs, immediately drove to the defendant's apartment and arrived almost simultaneously with the defendant indicates some communication between them to arrange the meeting for a purpose related to that communication. If Tito already had possessed a supply of drugs sufficient to complete the sale to the informant, it is unlikely that he would have made a special trip to the defendant's apartment prior to meeting with the informant.

Further, Tito's return to the defendant's apartment after delivering the drugs to the informant, and his payment of money to the defendant there, indicates the significance of the apartment as the center of the drug distribution operation. "In making his determination on

the issue of probable cause, the magistrate is entitled to rely on the ordinary dictates of common experience and on his own common sense." *State* v. *Bember*, 183 Conn. 394, 412, 439 A.2d 387 (1981). We conclude that the facts contained in the search warrant application support a reasonable inference that the apartment was the source of the drugs delivered by Tito to the informant and that additional drugs probably would be found there. We conclude that the trial court properly found that probable cause existed to issue the search warrant and, therefore, properly denied the defendant's motion to suppress.

II

The defendant next claims that he was penalized for exercising his right to a judicial determination of his motion to suppress the evidence obtained as a result of the warrant. The basis for this claim is the plea bargain made before the trial court denied the defendant's motion to suppress.

The defendant was charged in a four count information with two counts of selling illegal drugs in violation of § 21a-278 (a), one count of operating a drug factory in violation of General Statutes § 21a-277 (c) and one count of risk of injury to a child in violation of General Statutes § 53-21. On June 17, 1997, the trial court announced that a plea offer of "eight years to serve in jail" had been made to the defendant, but that the defendant wanted a hearing on his motion to suppress. The court stated further that if the defendant wanted to plead guilty after losing that motion, the sentence would be nine years instead of eight years. The defendant responded that he understood.[3]

[3] The colloquy between the trial court and the defendant was as follows:

"[The Court]: Now, in this matter, Mr. Revelo, I offered you eight years to serve in jail. You understand that? Si or no? And you want to have a hearing on a motion to suppress, right?"

"The Defendant: Yes.

Two weeks after the denial of his motion to suppress,[4] the defendant accepted an offer of a plea bargain for a definite sentence of nine years imprisonment on the charge of sale of illegal drugs, reserving the right to appeal the denial of his motion to suppress pursuant to § 54-94a. The state agreed to nolle the three remaining charges. After canvassing the defendant about his understanding of the consequences of a nolo contendere plea and informing him that a sentence of nine years imprisonment would be imposed under the plea agreement, the trial court accepted the plea and made a finding of guilty on the charge of selling illegal drugs. At the conclusion of the proceeding, the court imposed a sentence of nine years in the custody of the commissioner of correction.

The defendant contends that the trial court added one year to the eight year sentence offered as punishment for the charged offense to induce the defendant to waive his constitutional and statutory rights to a judicial determination of his motion to suppress. He claims that the additional year of imprisonment was imposed for exercising his statutory and constitutional rights to contest the validity of the search warrant by filing a motion to suppress and therefore violated his right to due process.

The state maintains that the due process issue raised by the defendant is not reviewable because § 54-94a limits the bases of appeals from denials of motions to suppress evidence allegedly obtained from unreasonable searches or seizures. Section 54-94a provides in relevant part that "[t]he issue to be considered in such

"The Court: And if you lose that motion and you want to plead, it's nine years, not eight years. You understand that?

"The Defendant: Yes."

[4] The motion to suppress the evidence obtained from the search of the defendant's apartment was heard and decided by a judge different from the one who imposed the sentence.

an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. . . ." The issue of the propriety of the denial of the defendant's motion to suppress was properly preserved for appellate review in accordance with § 54a-94a and Practice Book § 61-6 (a), formerly § 4003, and we have upheld the denial of that motion in part I of this opinion.

The defendant argues, nevertheless, that his claim that the trial court imposed one additional year of imprisonment because he refused to relinquish his right to a judicial determination of his motion to suppress satisfies the criteria established by *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), for appellate review of unpreserved constitutional claims: "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) We do not agree that this claim is reviewable, however, because it is not properly before us on appeal.

"What § 54-94a does is abrogate, in certain circumstances, the waiver of constitutional rights that [are] implicit in a guilty or nolo contendere plea." (Internal quotation marks omitted.) *State* v. *Piorkowski*, 236 Conn. 388, 401, 672 A.2d 921 (1996). The conditions of § 54-94a, however, must be strictly construed and claims that are not encompassed within the statute should not be considered. *State* v. *Sebastian*, 41 Conn. App. 530, 534, 677 A.2d 437, cert. denied, 238 Conn. 906, 679 A.2d 365 (1996); see *State* v. *Madera*, 198 Conn.

92, 99, 503 A.2d 136 (1985). Section 54-94a does not encompass the claim made by the defendant and, therefore, it is not reviewable. See *State* v. *Cedric S.*, 51 Conn. App. 539, 540, 722 A.2d 299 (1999).

Under the particular circumstances of this case, the defendant knew exactly what was being offered after his motion to suppress was denied, i.e., a sentence of nine years on one count of a four count information, reserving the right to appeal pursuant to § 54-94a. He was free to refuse the offer and to exercise his constitutional right to a trial. Instead, he chose to accept it, knowingly and freely, with the advice and assistance of an attorney, and with a full understanding of the consequences of entering such a plea, as explained to him by the trial court.

As long as the defendant is free to accept or reject the offer, there is no element of punishment or retaliation. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). By entering his plea of nolo contendere pursuant to § 54-94a, he accepted the condition of the statute that "[t]he issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress . . . ." A review of the plea canvass reveals that the defendant expressly stated that he understood that the only issue he could raise on appeal was whether the trial court improperly denied his motion to suppress.[5]

[5] During the plea canvass, the court inquired of the defendant as follows:

"The Court: Now, the agreement is nine years; do you understand that?

"[The Defendant]: Yes. . . .

"The Court: You filed a written plea of nolo contendere. It's a conditional plea of nolo contendere in that you want the right to take an appeal from Judge Gill's denial of your motion to suppress evidence based on [an unreasonable] search or seizure; do you understand that?

"[The Defendant]: Yes.

"The Court: And the issue to be considered in such an appeal is solely, and limited to, whether it was proper for the court to have denied the motion to suppress. Do you understand that?

"[The Defendant]: Yes.

Further, the defendant's written and signed plea of nolo contendere offered pursuant to § 54-94a specifically stated that the plea was being entered on the condition that he had the right to take an appeal, with the following motion reserved for review: "Denial of motion to suppress by Judge Gill."[6] We conclude, therefore, that the defendant does not have the right to raise on appeal the issue he asks us to review. Accordingly, we will not review his claim.

The judgment is affirmed.

In this opinion LANDAU, J., concurred.

SHEA, J., dissenting. I agree with part I of the majority opinion, which upholds the denial of the motion to suppress. I disagree with part II, however, in which the majority refuses to address the claim of the defendant that his constitutional right to due process of law was violated when the trial court sentenced him to one additional year of confinement because he insisted on a judicial determination of his motion to suppress. I believe that the defendant's claim satisfies the criteria established by *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), for appellate review of unpreserved claims of constitutional error and also presents an occasion for the exercise of our supervisory authority over proceedings on appeal. I conclude that the additional year of confinement imposed on the defendant as a penalty for exercising his lawful right to pursue his motion to suppress is contrary to due process of law and, therefore, invalid.

"The Court: Okay. You pleaded no contest. You're not admitting that the drugs were yours. You've entered your plea to accept the sentence of nine years rather than go to trial where you acknowledged the state would have had substantial evidence to convict you and if convicted, you could have received a more severe penalty; do you understand that?

"[The Defendant]: Yes."

[6] The plea, dated August 28, 1997, was accepted by the trial court and was conditioned pursuant to § 54-94a.

The majority does not dispute the defendant's claim that the trial court added one additional year to his sentence for the crime as a penalty for pursuing his motion to suppress because the state has suggested no other explanation for the plea bargain offer of eight years made by the trial court[1] if that motion was abandoned but nine years if the motion was denied after a hearing. The majority maintains, however, that the defendant's constitutional claim cannot be reviewed in this appeal because the statute authorizing an appeal from the denial of a motion to suppress, General Statutes § 54-94a,[2] provides that "[t]he issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. . . ."

I

I agree with the defendant that his claim that the trial court imposed one additional year of imprisonment on him because he refused to relinquish his right to a judicial determination of his motion to suppress satisfies the criteria established by *State* v. *Golding*, supra, 213 Conn. 239–40, for appellate review of unpreserved claims: "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant

[1] The use of the first person singular by the trial court suggests that the court was engaged in plea bargaining in presenting the options of an eight or nine year sentence to the defendant depending on whether he pursued or abandoned his motion to suppress. Judicial participation in the plea bargaining process has been disapproved. *State* v. *Fullwood*, 194 Conn. 573, 580–81, 484 A.2d 435 (1984); *State* v. *Gradzik*, 193 Conn. 35, 47, 475 A.2d 269 (1984). We presume, however, that the court was merely reciting an offer that had been made by the prosecutor.

[2] See footnote 2 of the majority opinion.

of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.)

The majority does not maintain that the defendant's claimed violation of his right to due process of law does not satisfy the four *Golding* criteria for appellate review of unpreserved claims. Instead, it contends that such review is not available in an appeal pursuant to § 54-94a because of the provision in that statute limiting the issue on appeal to "whether it was proper for the court to have denied the motion to suppress" and the defendant's acceptance of a plea agreement providing for a nine year sentence with a right to appeal the ruling on his motion. Implicitly, the majority regards § 54-94a as a restriction on the jurisdiction of an appellate court to consider issues raised in an appeal that are not specified in the statute. It relies on decisions involving nolo contendere pleas pursuant to § 54-94a in which defendants have attempted unsuccessfully to raise issues other than those specified, such as *State* v. *Madera*, 198 Conn. 92, 99, 503 A.2d 136 (1985), *State* v. *Sebastian*, 41 Conn. App. 530, 534, 677 A.2d 437, cert. denied, 238 Conn. 906, 679 A.2d 365 (1996), and *State* v. *Cedric S.*, 51 Conn. App. 539, 540, 722 A.2d 299 (1999). In none of those cases, however, was it claimed that the issues the defendant sought to raise qualified for review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. In two of them, *Madera* and *Sebastian*, the court recognized that the authority of an appellate court over proceedings on appeal was not subject to the restriction of § 54-94a on the issues to be considered on appeal. "The question remains whether we should exercise our inherent supervisory authority over the administration of justice . . . and adopt a procedure that would allow criminal defendants to enter pleas based upon conditions other than those specified in § 54-94a." (Citations omitted.)

State v. *Madera*, supra, 99–100. "[I]n appropriate circumstances we will exercise our powers of supervision and control over proceedings on appeal in the spirit of the purpose of our rules, namely to facilitate business and advance justice." *State* v. *Sebastian*, supra, 537–38.

This court has explicitly rejected the view of the majority that § 54-94a restricts the subject matter jurisdiction of an appellate court to consider issues involved in an appeal beyond those specified in the statute. "When viewed in light of the definition of subject matter jurisdiction and the statutes that create such jurisdiction, it becomes clear that § 54-94a neither confers nor curtails appellate subject matter jurisdiction." *State* v. *Piorkowski*, 37 Conn. App. 252, 258, 656 A.2d 1046 (1995), rev'd on other grounds, 236 Conn. 388, 672 A.2d 921 (1996). Our Supreme Court has adopted the same position: "We agree with the defendant and the Appellate Court that § 54-94a is not a subject matter jurisdictional statute." *State* v. *Piorkowski*, 236 Conn. 388, 400, 672 A.2d 921 (1996). It is clear, therefore, that this court has jurisdiction to consider an unpreserved claim that a sentence violates a defendant's constitutional rights if the *Golding* criteria are satisfied or if the claim presents an appropriate occasion for the exercise of our supervisory authority over proceedings on appeal. I believe the defendant's claim that his right to due process of law was violated by the sentence imposed qualifies for appellate review on both those grounds.

II

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Nevertheless, courts have implicitly or explicitly approved tactics used by prosecutors in offering various

inducements to persuade defendants to waive their constitutional rights to a trial or appeal by pleading guilty. "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). The many considerations that ultimately result in a plea bargain agreed on by the parties seldom appear on the record and are usually irrelevant after a guilty plea has been accepted by the court.

This case, however, involves the burdening of the defendant's constitutional and statutory right to a judicial determination of his motion to suppress by a penalty imposed by the trial court of one additional year of imprisonment for exercising that right. It is commonplace in the plea bargaining process for defendants to waive similar rights, such as the right to a jury trial or to an appeal, at the behest of the prosecutor in reaching plea agreements. A defendant is free to waive his rights to achieve the most favorable disposition of his case that is available. A prosecutor may use what leverage he has in attempting to obtain guilty pleas in most cases to expedite the movement of cases through the criminal justice system. Normally, without any participation by the trial court in the plea bargaining process, the result is a guilty plea with an agreed sentencing recommendation fitting within the standard parameters. Once an agreement is reached and a guilty plea is accepted by the trial court, the various factors that produce that result have no further significance. The case is concluded except for the actual sentencing judgment.

In this case, no such final conclusion was reached because the defendant entered a plea of nolo contendere, reserving his right to appellate review of the denial of his motion to suppress pursuant to § 54-94a. This is not simply a case of plea bargaining between the

prosecutor and the defendant with no restraints on either party, as the majority maintains. The record makes it clear that the court was the agent that burdened the defendant's right to a judicial determination of his motion to suppress by sentencing him to one additional year of confinement for exercising that right. Although *Bordenkircher* v. *Hayes*, supra, 434 U.S. 357, relied on by the majority, appears to give prosecutors carte blanche in the plea bargaining process, it provides no shield for judges. I agree with the defendant that the additional year added to his sentence was contrary to due process of law because it was punishment for doing "what the law plainly allow[ed] him to do." Id., 363.

III

"Section 54-94a is intended to promote judicial economy by allowing the parties to litigate a suppression or dismissal issue fully in the trial court, and thereafter allowing the defendant to obtain review of an adverse ruling without the parties' or the court's expending additional resources." (Internal quotation marks omitted.) *State* v. *Piorkowski*, supra, 236 Conn. 402, quoting *State* v. *Piorkowski*, supra, 37 Conn. App. 259. Quite apart from whether the imposition of a penalty of one additional year of imprisonment for pursuing the motion to suppress in the trial court violates the defendant's right of due process, it is evident that such a penalty is inconsistent with the legislative purpose of § 54-94a to promote judicial economy. If the penalty were five or ten years of additional imprisonment instead of the fairly modest one year imposed on this defendant, few defendants would attempt to use that statute to preserve their right to appellate review of the denial of a motion to suppress. They could simply proceed to trial and appeal from the judgment of conviction, raising the denial of the motion as a ground for reversal as well

as making other claims. The salutary purpose of § 54-94a in expediting the disposition of criminal cases would be thwarted and the statute might become a dead letter.

This case presents an appropriate occasion for the exercise of our supervisory authority over proceedings on appeal "to facilitate business and advance justice." *State* v. *Sebastian*, supra, 41 Conn. App. 537–38. As an appellate court, we ought not to permit trial courts to penalize the exercise of a defendant's right to a judicial determination of his motion to suppress evidence claimed to have been obtained illegally. The legislature has enacted § 54-94a to encourage defendants to use the expedited procedure it provides for resolving a case where the only substantial issue is the validity of a search or the admissibility of a confession. I believe that imposing additional punishment on a defendant who seeks a judicial determination of his motion to suppress will thwart the legislative purpose of that enactment.